IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4391 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURESHKUMAR MANACKEL

Versus

BOARD OF TRUSTEES OF THE PORT KANDLA

Appearance:

MR DIPAK R DAVE for the Petitioner.

MR SR BRAHMBHATT for Respondent Nos. 1-4

MR ANANT S DAVE for Respondent No. 5

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 17/12/2003

ORAL JUDGEMENT

1. The petitioner is serving as an Assistant Accounts Officer in the Kandla Port Trust. Post of Assistant Secretary, Class I, fell vacant in April, 1998, and since at the relevant time, no suitable candidate was

available in the feeder cadre, the respondent-Trust kept the said post vacant, at the relevant time. Since it was not possible for the Department to get meritorious candidate, it was decided to amend the Rules.

The Trust thereafter, by its Resolution No.79, dated 3.10.1998 amended the Recruitment Rules in connection with promotion to the post of Assistant Secretary and the Circular regarding the Promotion to the post of Assistant Secretary reads as under :-

" ... ...

One post of Assistant Secretary - Class - I in the Scale of Rs.4350-7500 is required to be filled up by promotion.

The recruitment rules for the post have since been revised vide Board Resolution No.79 of 3.10.1998 which are as under :-

" Degree of a recognized University or equivalent. Promotion from Office Superintendents with two years service in the grade and Head Clerks with five years service in the grade on the basis of merit in the written test, failing which by promotion from amongst Personal Assistants, Assistant Estate Manager, Assistant Accounts Officer and Superintendent (Accounts) and Cost Analyst on the basis of merit in the written test, failing which by direct recruitment."

Eligible Office Superintendent and Head Clerks did not pass the required written test.

Hence, the employees working in the category of Personal Assistants, Assistant Estate Manager, Assistant Accounts Officer, Superintendent (Accounts) and Cost Analyst and possessing a degree of a recognised University are directed to apply in the prescribed form (attached herewith) for appearing in the written test to be conducted shortly for considering them for promotion to the post of Assistant Secretary Class I.

The application duly filled in should reach this Office through proper channel on or before

21.8.1999.

... ..."

On the basis of the said Rules, applications were invited from eligible candidates of the Department and the eligible candidates applied in response to the said advertisement. The said advertisement is known as "Internal Departmental Advertisement".

The present petitioner applied for the said post. Respondent No.5 also applied for the said post. According to the petitioner, he secured higher percentage of marks in the written test as compared to respondent No.5. However, by an order dated 11th May, 2001, respondent No.5 was promoted to the post of Assistant Secretary (Class I). The said order, promoting respondent No.5, is challenged by the petitioner on the ground that since the petitioner had secured more marks in the written test, he was more suitable for the post in question. It is argued by Mr.Dave for the petitioner that, as per the Recruitment Rules, selection is required to be made on the basis of merit in the written test and, according to Mr.Dave, merit in the written test would mean percentage of marks secured by the candidate in such written examination. He submitted that, on the basis of such performance in the written test, the DPC is required to pass appropriate order, giving appointment to such person, on the aforesaid post.

2. The fact that the petitioner has obtained more marks in the written test is not denied by the respondents in their affidavit-in-reply. Therefore, in view of the aforesaid admitted fact that the petitioner has secured more marks in the written test as well as considering the Recruitment Rules at page 27, the DPC was required to pass appropriate order, selecting the petitioner for the said post. No justifiable reasons have been given in the reply as to on what ground the claim of the petitioner was bypassed even though he had secured more marks. It is not even the case of the Trust that the comparative service record of respondent No.5 was better or that respondent No.5 was found more meritorious as compared to the petitioner.

It is argued by Mr.Brahmbhatt that even though the petitioner might have secured more marks in the written test, that, ipso facto, cannot be taken into consideration for appointing a person on the aforesaid post, as, DPC is required to play some role. Even if that argument is to be accepted, then also it is

difficult to uphold the said contention because the Trust is not in a position to state as to in what manner respondent No.5 was found more suitable, as compared to the petitioner and if the service record of both of them is at par, naturally, weightage is required to be given to a person, who has secured more marks in the written examination, as the Rules framed by the Trust is absolutely clear on this point. Mr.Brahmbhatt is not in a position to demonstrate as to why, in preference to the petitioner, respondent No.5 was selected by the DPC, even though the petitioner has secured more marks in the written examination.

3. At this stage, Mr.Brahmbhatt argued that since respondent No.5 was to retire within a short period, perhaps, his seniority might have played a pivotal role. However, in my view, looking to the Recruitment Rules, seniority can never be treated as the sole criterion for appointment to the post in question, as, ultimately, the Department wanted more meritorious person for the post in question. Mr.Brahmbhatt, however, submitted that respondent No.5 has already retired and, therefore, even though the action of the Trust may not be sustainable, yet, the Court may not disturb the selection of respondent No.5, by virtue of which he was, ultimately, selected / promoted.

4. After hearing learned Advocates of both the sides and after considering the petition and the reply, in my view, even though the action of the respondents in not considering the case of the petitioner for appointment / promotion for the aforesaid post in view of the fact that he had obtained higher percentage of marks in the written test, and the action of the respondent-Trust in appointing respondent No.5 on the basis of his selection to the said post is not sustainable, since respondent No.5 has already retired, I would not like to strike down his promotion; instead, I direct the Trust to consider the case of the petitioner now for appointment to the said post by virtue of his performance in the written test, which was taken earlier, in order to select the present petitioner for the aforesaid post in question. The Trust may accordingly now reexamine the case of the petitioner in the light of his performance in the written test and, appropriate order may be passed for giving the petitioner benefit of such appointment on the basis of his performance in the earlier written test, which was already undertaken, and the petitioner may not be required to appear again in the written examination for the purpose of appointment on the aforesaid post, which is, at present, lying vacant in view of the retirement of

respondent No.5 on attaining the age of superannuation. The Trust may take appropriate decision in this connection for filling up the vacant post on the basis of the performance of the petitioner in the earlier written test in which he had appeared and secured more marks and the petitioner shall not be compelled to appear again for fresh written test and may not be obliged to appear again before the DPC, as, in my view, his non-selection and consequent non-appointment to the said post is not found to be correct. The Trust may, ultimately, pass appropriate fresh orders in connection with the appointment of the petitioner on the basis of his performance in the earlier DPC and performance in the written test. However, it is clarified that such appointment of the petitioner, if any, shall be effected from the date on which he takes charge in case he is given such appointment or selection order. This direction is given, because, since respondent No.5 has already retired, the Court would not like to set aside his appointment / promotion orer.

5. Mr.Dave, at this stage, argued that the petitioner is entitled to get appointment on the said post with retrospective effect, i.e. the date on which respondent No.5 was appointed, so that he can get the benefit of continuity of service on the promotional post. However, for this purpose, it will be open for the petitioner to make a representation to the Trust, for the purpose of giving him notional promotional benefit on the said post. If any such representation is made, the Trust may decide the same in accordance with law and whatever decision that may be taken, will be acceptable to the petitioner. Mr.Dave for the petitioner states that whatever decision the Trust takes in connection with the seniority for the interim period, by which he was deprived to take charge of the said post, will be acceptable to him and he will not take out any further proceedings in this connection.

6. In the above view of the matter, the Trust is directed to take appropriate decision as the post is already lying vacant. Such decision may be taken as early as possible, in any case, by 15th January, 2004.

Mr.Brahmbhatt has assured the Court that such decision will be taken within the stipulated time.

It is clarified that order passed in favour of respondent No.5 is not disturbed in any manner by this order.

The petition is allowed to the aforesaid extent. Rule is made absolute accordingly, with no order as to costs. Interim relief, if any, shall stand vacated.

17th December, 2003 (P.B. Majmudar, J.)

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(apj)